LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 21 1964
JOHN F. DAVIS, CLERK

No. 422

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

FEDERAL TRADE COMMISSION, *Petitioner*

v.

CONSOLIDATED FOODS CORPORATION, *Respondent*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

ANDERSON A. OWEN
DANIEL WALKER
WILLIAM I. GOLDBERG

Attorneys for
Consolidated Foods Corporation

Of Counsel:

HOPKINS, SUTTER, OWEN, MULROY, WENTZ & DAVIS
One North La Salle Street
Chicago 2, Illinois

September 21, 1964

TABLE OF CONTENTS

PAGE

THE HEART OF THE CASE 1

SUMMARY OF ARGUMENT 2

There Is No Legal Issue Concerning the Standards To Be Applied to Conglomerate Mergers 3

The Seventh Circuit Has Already Determined the Legal Issue Involving Reciprocity-Creating Mergers in Favor of the Solicitor General's Position 4

The Issues Here Are Purely Factual 5

Consideration of Post-Acquisition Evidence in This Case Is Not Inconsistent With the Prophylactic Function of Section 7 6

This Court Has For Now Spoken Sufficiently and Fully on the Interpretation of Section 7 7

QUESTION PRESENTED 9

ARGUMENT

THE NECESSITY OF CONSIDERING THE RECORD IN DECIDING THE PETITION 13

Proper Analysis of the Seventh Circuit's Decision 13

The Reasons for Considering the Structure of the Record at This Time 15

WHAT IS RECIPROCITY? 16

Reciprocity as a Market Power Varies From Industry to Industry 16

The Importance of the Buyer Testimony 18

PAGE

THE RECIPROCITY RECORD IN THIS CASE 20

The Two Types of Reciprocity Relied on by the Commission 20

The Circumstantial Evidence Relied on by Commission Counsel 22

Consolidated's Defense Was Based on Direct Evidence 24

The Reasons Given by Buyers for the Non-effectiveness of Reciprocity 33

The Numbers Game 36

The Proceedings Before the Commission 37

The Argument to the Seventh Circuit 37

The Over-All Statistical Comparisons 38

How Various Groups of Allegedly Reciprocity-Affected Gentry Customers Divided Their Onion Business as Compared to All Gentry Onion Customers in 1957 39

Onion and Garlic Market Shares 40

CONCLUSION 43

CITATIONS

Brown Shoe Co. v. *United States*,
370 U.S. 294 (1962) 3, 8

Commissioner v. *Duberstein*,
363 U.S. 278 (1960) 8

Maryland v. *Baltimore Radio Show, Inc.*,
338 U.S. 912 (1950) 15

National Labor Relations Board v. *Pittsburgh Steamship Co.*,
340 U.S. 498 (1951) 8

PAGE

Procter & Gamble,
CCH Trade Reg. Rep., ¶ 16,673 (1963) 4

United States v. *Aluminum Company of America*,
377 U.S. 271 (1964) 8

United States v. *Continental Can Co.*,
378 U.S. 441 (1964) 8

United States v. *duPont*,
353 U.S. 586 (1957) 6, 8

United States v. *El Paso Natural Gas Co.*,
376 U.S. 651 (1964) 8

United States v. *Penn-Olin Chemical Co.*,
378 U.S. 158 (1964) 8

United States v. *Philadelphia National Bank*,
374 U.S. 321 (1963) 8, 18, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 422

FEDERAL TRADE COMMISSION, *Petitioner*

v.

CONSOLIDATED FOODS CORPORATION, *Respondent*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

THE HEART OF THE CASE

The key to this case—as the Court of Appeals for the Seventh Circuit recognized—is the failure of the Federal Trade Commission to prove that reciprocity can be a market power of consequence in the food industry. The Solicitor General, like the Commission, largely ignores the record and assumes that the acquisition by Consolidated, a food processor, wholesaler and retailer, of Gentry, a processor of dehydrated onion and garlic used by some of Consolidated's suppliers and by other companies, created a reciprocity power which would result in substantial sales by Gentry. Having thus assumed the effectiveness of reciprocity, the Solicitor General then concludes that this case presents the legal issue whether, when a conglomerate merger creates an effective market power, the merger is invalid under Section 7 of the Clayton Act. (See Petition, pp. 8, 9, 11.)

But the real issue is the one to which the Solicitor General assumes the answer. It is solely one of fact—was reciprocity proved to be a power in the market involved in this case; can reciprocity produce for Gentry any sales of consequence in the food industry? For it is in the food industry generally, among all types of food processors and other users of dehydrated onion and garlic, that the answer to this question must be found. The Seventh Circuit held that years of experience as reflected by the record demonstrated the Commission's failure to prove that reciprocity is in fact a power of any consequence in that market.

Only when this fact issue is resolved in his favor does the record present for decision the legal issue raised by the Solicitor General. Moreover, the Seventh Circuit decided this legal issue in favor of the position urged by the Solicitor General. It expressly held that there may be cases where reciprocity can be a market power having Section 7 consequences but that this is simply not such a case.

Thus, viewed in proper perspective, this case involves a fact issue, with the Seventh Circuit having held that the Federal Trade Commission failed to discharge its burden of proof. As such, the case neither requires nor merits further review by this Court.

SUMMARY OF ARGUMENT

In summary, the reasons given by the Solicitor General for granting the writ are these:

1. Because this case involves generally the legality of a conglomerate or diversification merger under Section 7 of the Clayton Act, it raises "new and important questions" which should be resolved by this Court. (Petition, p. 8)

2. Because this case involves specifically the validity under Section 7 of a conglomerate merger which allegedly creates a reciprocity power, a decision by this Court would have an important bearing on other pending cases. (Petition, p. 8)

3. This Court has never dealt with the significance of reciprocity under any of the antitrust laws. (Petition, p. 8)

4. The decision of the Court of Appeals giving "decisive weight to post-acquisition evidence" is "inconsistent with the prophylactic function of the Antimerger Act." (Petition, p. 13)

Respondent's argument that this case need not and should not be reviewed by the Supreme Court may be summarized as follows.

There Is No Legal Issue Concerning the Standards To Be Applied to Conglomerate Mergers

The legal principles governing conglomerate mergers are no different than those applicable to vertical or horizontal mergers. There is no dispute in this case concerning the standards established by this Court in a series of recent decisions involving Section 7. The Federal Trade Commission held—and the parties and the Seventh Circuit have agreed—that the legal standards of *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), govern not only this case but conglomerate mergers generally. No court has made any suggestion to the contrary; merger facts and industry contexts will vary but the legal principles are the same. The only real difference is that in a conglomerate merger there is no automatic market effect measurable by market shares.

Commissioner Elman of the Federal Trade Commission said it well in *Procter & Gamble*, CCH Trade Reg. Rep., ¶ 16,673 (1963):

> "It must be stressed, however, that Congress, in seeking to bring 'conglomerate' mergers within the reach of Section 7, did not thereby express the view that conglomerates are analytically a distinct merger class. Congress meant only that however a merger be characterized, its legal status under Section 7 is the same." (¶ 16,673 at p. 21,567).

The Seventh Circuit Has Already Determined the Legal Issue Involving Reciprocity-Creating Mergers in Favor of the Solicitor General's Position

The legal question as to whether a conglomerate merger giving rise to an effective reciprocity power can be bad under Section 7 has already been affirmatively decided by the Seventh Circuit in favor of the position taken by the Federal Trade Commission and the Solicitor General. The Seventh Circuit said this:

> "Undoubtedly there are situations resulting from acquisitions or mergers in which business reciprocity has the effect of substantially lessening competition or can be so utilized. Where the probability of such an effect arising out of a merger or acquisition is demonstrated the requirements for application of Section 7 are satisfied." (Petition, p. 21*)

* For the Court's convenience, we shall cite the decisions of the Seventh Circuit and the Federal Trade Commission by reference to the pages of the petition where they are reproduced.

There is no occasion for the Supreme Court to review this statement of the law.

The Issues Here Are Purely Factual

All that remains in this case is a fact issue—whether reciprocity can be an effective power in the food industry where Gentry and its competitors must sell their products. The Seventh Circuit decided this fact issue in accordance with well-established principles of appellate review. It concluded on the basis of a very lengthy record (3,587 pages of testimony and 652 exhibits, practically all of which deals with the issue of reciprocity effect), that the Commission had failed to prove that reciprocity was an effective market power in the food industry.

Under existing principles governing the selection of cases, there is no reason for this Court to review a long and complex record merely to determine whether the Court of Appeals for the Seventh Circuit properly evaluated the evidence in determining that the Commission failed to discharge its burden of proof. We also suggest that because the Commission based its "reciprocity case" almost entirely on circumstantial evidence and inference, whereas Consolidated proved through direct evidence that reciprocity, although repeatedly tried, was not and could not be successfully practiced in the food industry, that this is a singularly inappropriate case (and record) in which to assess and decide the Section 7 status of a market power created by a conglomerate merger. This question could better await a record where the Commission has not so obviously failed to prove the effectiveness of the alleged market power.

The Solicitor General states as a reason for granting the writ that this Court has never determined the significance of reciprocity under any of the antitrust laws. Reference

is then made to a number of secondary sources which discuss reciprocity as a business practice. (Petition, pp. 8-9) But this is a Section 7 case and the Court is not presented with any issue regarding the standing of reciprocity under the remainder of the antitrust laws. And the frequency of secondary comment discussing a business practice in industries and contexts other than those involved in the case before the Court does not and should not determine whether this case truly presents a substantial federal question under Section 7.

Consideration of Post-Acquisition Evidence in This Case Is Not Inconsistent With the Prophylactic Function of Section 7

We have already pointed out that post-acquisition evidence is material on the issue whether reciprocity is a market power at all, so that even if a rule were adopted preventing or inhibiting the consideration of post-acquisition events in the ordinary merger case, it would have no effect on the relevancy of the evidence relating to the exercise of reciprocity and the results flowing from it. But there are other reasons why this is an inappropriate case to consider a rule regarding consideration of post-acquisition evidence.

This Court has itself recognized that in some Section 7 cases post-acquisition experience is not only relevant but highly significant. In *United States* v. *duPont*, 353 U.S. 586 (1957), for example, the Court carefully examined the record to ascertain whether duPont's commanding position as a General Motors' supplier resulted from its stock position. The type of fact question involved there was not far

different from the market power question raised by this case.

It has been suggested by some that evidence of actual merger effects may be unrealistic because a market power conferred by the merger can be "sheathed" by the defendant. But the reciprocity power, if it exists, cannot be sheathed. Both the Commission and the Solicitor General have relied heavily on the conclusion that reciprocity is effective whether exercised or not. (See page 10 of the petition, were it is argued that food processors will naturally buy from Gentry, without anything being said, in the "hope or expectation" that Consolidated would favor them as suppliers.) Moreover, insofar as overt reciprocity is concerned, this record is replete with evidence that reciprocity was repeatedly "unsheathed" and found to be ineffective.

It cannot be maintained that considering post-merger evidence in this case would be to recognize the propriety of a "wait and see" policy regarding mergers that would be inconsistent with the prophylactic function of Section 7. Not only is the evidence relevant on the market power issue, but it was the enforcement agencies which chose to wait seven years after the merger before attacking it. Thus, this case cannot be a precedent governing those where the issue is simply merger effect or those where the case is brought before or immediately after the merger is consummated.

This Court Has For Now Spoken Sufficiently and Fully on the Interpretation of Section 7

This Court has established in a series of seven important decisions (four during the last term) the guidelines to be applied by the enforcement agencies and the federal courts

under Section 7 of the Clayton Act.* Those guidelines are not only applicable to conventional horizontal and vertical mergers; they also apply, as earlier noted, to conglomerate mergers. There is no suggestion by the Solicitor General that the Seventh Circuit in deciding this case departed from those principles.

We respectfully submit that absent a compelling legal issue or a conflict in the decisions—neither of which is present here—it is time to permit the lower federal courts to further develop the law of Section 7 in accordance with the standards already established by this Court. See, *Commissioner* v. *Duberstein*, 363 U.S. 278, 284, 296 (1960). And this is particularly true where as here the real issues are fact issues and it is the responsibility of the courts of appeal to determine whether the trier of facts has complied with the mandates of this Court as expressed in the existing Section 7 decisions.

Directly applicable here is *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498 (1951). The only difference between the two cases for our purposes is that in *Pittsburgh Steamship* the evidence was more evenly balanced whereas in this case the evidence, largely ignored by the Commission in favor of an assumption as to reciprocity effect, overwhelmingly supports respondent's position. Speaking for a unanimous Court, Mr. Justice Frankfurter stated in *Pittsburgh Steamship:*

---

* *United States* v. *duPont*, 353 U.S. 586 (1957); *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962); *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States* v. *Aluminum Company of America*, 377 U.S. 271 (1964); *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964); *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964).

> "Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. . . .
>
> "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.'" (340 U.S. at 502).

It may be added that such forbearance in this case would help to quiet the impression, now abroad, that it is only Supreme Court review which is of importance in Section 7 cases—a feeling which could detract to some immeasurable extent from the careful attention which should be given to these cases in the lower federal courts.

QUESTION PRESENTED

The Solicitor General has stated the question presented by his petition as follows:

> "Whether a large wholesale and retail grocer's acquisition of the assets of a firm producing ingredients used by processors of food who supply the grocer, violates Section 7 of the Clayton Act because such a merger creates a substantial probability that reciprocal buying policies will foreclose

> a substantial part of the already highly concentrated market for the ingredients to the competitors of the acquired company." (Petition, p. 2)

The legal aspect of this question was decided by the Seventh Circuit in favor of the Solicitor General's position when it held that "undoubtedly" there are mergers where reciprocity can have the effect of substantially lessening competition and would, therefore, violate Section 7. There is no dispute as to this holding.

Actually, the question presented by this record should read as follows, using the Solicitor General's language wherever possible:

> Whether a large wholesale and retail grocer's acquisition of the assets of a firm producing ingredients used by processors of food who supply the grocer, violates Section 7 of the Clayton Act *if it has been proved* that reciprocal buying policies will probably foreclose to competitors of the acquired company a substantial part of the market in the food industry generally for the ingredients sold by the acquired company—*or, in other words, if it has been proved that reciprocity in this case can be a market power of consequence.*

In posing his question, the Solicitor General has highlighted a key aspect of the case by erroneously describing the market where foreclosure must be assessed. That market is the one where the ingredients are sold, not where they are produced. And it is incorrect to state, as the Solicitor General does, that the "market for the ingredients" is "already highly concentrated."

The market for the ingredients sold by Gentry and its competitors is the food industry, consisting of thousands

of large and small food processors and other users of dehydrated onion and garlic scattered throughout the United States. It is the impact of reciprocity in this market which controls this case. Only if reciprocity can obtain and keep substantial sales for Gentry in the food industry generally can reciprocity have any effect on Gentry's competitors.

The structure of the dehydrated onion and garlic producing market becomes material only after it is determined that reciprocity can be a market power of consequence in the food industry generally. If it is not, then it matters little how many or how few producers of dehydrated onion and garlic there are—for the alleged "power" which is attacked as disrupting the structure of that market is not a power at all.

Stated in terms of the holding of the Seventh Circuit, the only question before the Court is whether the Seventh Circuit erred when it stated as follows:

> "Undoubtedly there are situations resulting from acquisitions or mergers in which business reciprocity has the effect of substantially lessening competition or can be so utilized. Where the probability of such an effect arising out of a merger or acquisition is demonstrated the requirements for application of Section 7 are satisfied. But our examination of the record in the instant proceeding fails to satisfy us that the Commission sustained its burden of showing that such a probability exists. In our appraisal of the substantiality of the evidence we must take into account whatever in the record fairly detracts from its weight. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488. And here ten years of post-acquisition experience—during which Consolidated attempted overt enforce-

ment of reciprocal buying practice where it deemed it might be successful—serves to demonstrate that neither the acquisition of Gentry, in and of itself, nor the overt attempts to use buying power to influence sellers to Consolidated to purchase from Gentry resulted in substantial anticompetitive effect." (Petition, pp. 21-22)

Speaking in terms of the Commission's decision, the real question which it raised was whether an administrative agency can ignore the record in favor of assumption in concluding that an alleged market power can result in substantial anticompetitive effect in the food industry. The Seventh Circuit properly concluded that it was the record which controlled the answer to this fact question.

ARGUMENT

I.

THE NECESSITY OF CONSIDERING THE RECORD IN DECIDING THE PETITION

The Seventh Circuit, like the parties at the trial of this case, considered the central issue to be whether it was adequately proved by the Commission's trial counsel that reciprocity is a substantial market power in the food industry. It is the Solicitor General's failure to recognize this as a fact issue requiring resolution before any legal issue is reached that leads to his oversimplification of the Seventh Circuit's decision.

Proper Analysis of the Seventh Circuit's Decision

The Seventh Circuit did not simply hold, as the petition states, that Gentry's failure to increase its market shares in the years following the merger demonstrated that the merger had no substantial anticompetitive effect. (Petition, p. 3) The Seventh Circuit said that the market share data (7% increase in onion share, 12% decrease in garlic share) "indicates not only that reciprocity had no substantial impact but also that there is no basis for rejecting the testimony that even the overt attempts to utilize reciprocity as an influence had little effect on the firms involved." (Petition, p. 23) The Court thus viewed the market share data as being relevant on the issue of reciprocity effect and also as corroborating the testimony of the many purchasing agents that reciprocity had not affected their buying decisions.

Thus, the Seventh Circuit turned to the record in this case—the only proper, indeed, the only available, source for determining the effectiveness of reciprocity in the food

industry—and decided that the Commission simply failed to prove that it was a power of consequence.

In attempting to cast doubt on the validity of the Seventh Circuit's findings that reciprocity was not proven to be effective, the Solicitor General states that there is a minimum of 25% of the market for dehydrated onion and garlic that is subject to reciprocity influence. (Petition pp. 6, 11) But the 25% figure does not refer to any evidence other than the statistic that there are that many food processors who do or could buy from Gentry and sell to Consolidated.

If for eight years, these processors nourished a "hope or expectation" that if they bought from Gentry, Consolidated would favor them (Petition, p. 10), it is strange indeed, as the Seventh Circuit recognized, that they failed to respond to this supposedly compelling "silent reciprocity" urge.

The petition states that the Seventh Circuit took the "position that great weight should be given respondent's occasional failure to compel reciprocal buying." (Petition, p. 14) But Consolidated did not prove merely "occasional failure" to compel reciprocity. Commission counsel at every stage of this case have argued that Consolidated repeatedly tried reciprocity in every form with a large number of customers during the years from 1951 to 1957.

In other words, this record provided an excellent basis for testing the actual marketplace effect of reciprocity in the food industry. And Consolidated deliberately picked up this gauntlet—it proceeded to prove through direct and uncontradicted evidence that Consolidated's reciprocity attempts simply did not produce any sales of consequence. This evidence—not "occasional failure to compel reciprocity"—led to the key holdings of the Seventh Circuit.

The Reasons for Considering the Structure of the Record at This Time

We cannot expect the Court to simply accept our word that the fact issue in this case from the outset was the actual effectiveness of reciprocity in the food industry, so that before the legal issues presented by the Solicitor General can be reached, a thorough review of this lengthy record will be required. We must, therefore, give the Court in capsule form some basis for evaluating the record itself.

This is particularly necessary since the Solicitor General has given the impression in his petition that this record is replete with proof of reciprocity effectiveness and that all Consolidated proved was a hesitancy to enforce this supposedly awesome power.

We believe also that reviewing the structure of the record—the types of evidence offered—will demonstrate the record's inadequacies as a vehicle for determining that reciprocity is a real market power. If even the types of evidence demonstrate that the Seventh Circuit correctly determined that the Commission by relying on inference and assumption rather than direct evidence failed to discharge its burden of proof on the key fact issue, there is little point in taking the case in an effort to reach the legal questions raised by the Solicitor General.

As Mr. Justice Frankfurter stated in his opinion discussing the Court's certiorari policy in *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950), "A case may raise an important question but the record may be cloudy." This is at best such a record, from the Solicitor General's standpoint, even if the Court should disagree with our view that no important legal question is raised here.

II.

WHAT IS RECIPROCITY?

Reciprocity is a selling device, a sales argument, not a binding contractual arrangement. When used overtly, it operates if at all when the salesman says to the buyer (using the language of the Federal Trade Commission in this case), "I will buy from you if you will buy from me." (Petition, p. 29) As the record in this case shows, even in those few instances where a buyer responds to a reciprocity request, the decision will inevitably also be based at least partially on price, service and quality and will govern only that order. When the salesman returns, the buyer may change his mind and decide not to place another order because prices have changed, quality varies, service was poor, or for any one of a variety of reasons.

It is this at worst infrequent and temporary effect of reciprocity that makes it most difficult to argue that it can "foreclose" any market of consequence. It also makes necessary an analysis of the industry in which reciprocity is being considered.

Reciprocity as a Market Power Varies From Industry to Industry

Because there are differences in the degrees of control over purchasing and the importance of price, service and quality, the influence of reciprocity will vary from industry to industry. The Seventh Circuit recognized this by stating that there are undoubtedly situations where reciprocity can make a merger unlawful under Section 7. The Seventh Circuit then went on to analyze reciprocity in the food industry on the basis of the record in this case. The Federal Trade Commission chose to ignore this record and turned instead to old transportation industry cases in the

portion of its opinion (see particularly part IV) devoted to reciprocity effect:

> "Any suggestion that such [reciprocity] power cannot effectively be exploited fails to account for clear-cut historical instances when it has been. Consider, for example, the dramatic effect of reciprocity in Waugh Equipment Co. * * * where the acquired firm was enabled to leap from insignificance to control of 35% of the market and industry leadership in only six years. Respondent has given us no reason to believe that industry conditions preclude its achieving similar results." (Petition, p. 45)

Thus, the Commission, while implicitly recognizing in the last sentence of the above quotation that reciprocity effect could vary from industry to industry, did not discuss or even acknowledge the evidence showing the many reasons why the food industry is unlike the transportation industry.

A variety of factors operate in the food industry to prevent reciprocity from having any substantial effect. These are a few of the critical ones, all established by direct evidence in this record:

1. The more that price, service and quality must control a buyer's decision, the less effective reciprocity will be. In the food industry where profit margins are low and consumer satisfaction is such a key factor, price, service and quality are all important.

2. Food ingredient buyers are controlled to a great degree by quality control departments and laboratories which serve to insulate the buyers from sales department influence.

3. As Commission counsel conceded in his brief before the Seventh Circuit, reciprocity effect is blunted by consumer demand for nationally advertised products—they *must* be carried by wholesalers and retailers. The Seventh Circuit found that reciprocity had especially little effect "in the case of nationally known and advertised brands which through consumer acceptance and loyalty would be relatively immune from individual wholesaler or retailer dictation of the source from which ingredients must be obtained." (Petition, p. 23)

4. Buyers increasingly insist on two or more sources of supply. The necessity for this supply source protection mitigates against favoring one source to the exclusion of others.

The Importance of the Buyer Testimony

The impact of the food industry factors which inhibit reciprocity effect was repeatedly described in this record by knowledgeable food company officials, particularly the ingredient buyers. Neither the Hearing Examiner nor the Commission found this testimony not credible; they simply ignored it.

This is not a case such as *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), where the defendant's reliance on competitor testimony as to absence of effect on competition was dismissed by the Court in the following language:

"There was, to be sure, testimony by bank officers to the effect that competition among banks in Philadelphia was vigorous and would continue to be vigorous after the merger. We think, however,

> that the District Court's reliance on such evidence was misplaced. This lay evidence on so complex an economic-legal problem as the substantiality of the effect of this merger upon competition was entitled to little weight, in view of the witnesses' failure to give concrete reasons for their conclusions." (374 U.S. at 366-367)

The buyer testimony in this case did *not* deal with a "complex economic-legal problem." It dealt with the question which only they could answer—why did they, as buyers, choose Gentry or its competitors as sources of supply for dehydrated onion and garlic during the years from 1951 to 1958?

Further, these witnesses (unlike the competitors in *Philadelphia National Bank*) did give "concrete reasons for their conclusions." They testified in detail and repeatedly to the very real reasons why reciprocity cannot be an effective market force in the food industry.

We repeat — it is in the record in this case where the answer must be found to the question whether reciprocity can, in fact, foreclose any substantial market to Gentry's competitors.

III.

THE RECIPROCITY RECORD IN THIS CASE

The Two Types of Reciprocity Relied on by the Commission

The Federal Trade Commission assumed that reciprocity was a market force which would produce business for Gentry without any overt action by Consolidated or Gentry merely because the advantage of buying from Gentry was manifest to all who sold and wished to sell to Consolidated:

> "It is certainly obvious, to use an example based on the facts of this case, that a food processor who uses dehydrated onion or garlic and who seeks to curry Consolidated's business will tend to prefer Gentry as his source of supply, and the advantages accruing to him from so favoring Gentry would not have to be pointed out by Consolidated.
>
> • • •
>
> "It seems clear that merely as a result of its connection with Consolidated, and without any action on the latter's part, Gentry would have an unfair advantage over competitors enabling it to make sales that otherwise might not have been made." (Petition, pp. 36, 40-41)

The Solicitor General has accepted this reasoning in arguing that food processors will, without anything being said, favor Gentry in the "hope or expectation" that Consolidated would favor them. (Petition, p. 10)

The Commission and the Solicitor General have also stated that reciprocity power can be overtly exercised. It was repeatedly attempted. To give just one typical example, there are a number of documents referring to reciprocity attempts with 15 potential Gentry customers, referred to irrever-

ently as the "unholy 15.". A Gentry official wrote as follows about these 15 companies:

> "Mr. Kennedy [Consolidated's President] is very enthused over the possibility of helping to increase our distribution in every way possible, and I know he will do everything within his power to see that some of these tough nuts are cracked." (CX 6, J. A. 166, 1990*)

Perhaps the best way of showing the extent to which overt reciprocity was attempted after 1951 is to refer to the brief of Commission counsel before the Seventh Circuit. According to that brief, Gentry's customers were subjected to "outright coercion," "pressure," "high gear pressure," "extortion," "heat," "coercive measures," "crude exercise of economic power," "Consolidated's resourcefulness in implementing its reciprocal buying power" and silent reciprocity effect where "sophisticated businessmen realize that it will be to their advantage to accommodate an important customer." (F.T.C. Brief, pp. 39, 40, 46, 48, 50, 52, 57, 58, 59, 60)

The case presented by Commission counsel prevents any argument that reciprocity had since 1951 only an "incipient" effect which could grow to substantiality in the future. Commission counsel set out to prove (relying not only on "silent" reciprocity but also on the many attempts at overt reciprocity) that reciprocity was a substantial market power. But the record as a whole demonstrates that the ac-

---

* The Joint Appendix filed in the Court of Appeals is cited "J.A." For exhibits, the citation will also include the exhibit number. "CX" refers to Commission Exhibits and "RX" refers to Respondent's (Consolidated) Exhibits. With the permission of the Court of Appeals, some statistical exhibits were not printed in the Joint Appendix.

tual effect of reciprocity was de minimis; reciprocity was not a "child" having growth potential which permits reliance on the Section 7 "incipiency" doctrine; reciprocity in the context of this case has had its full growth.* And the record shows that the growth is not sufficient to reach the level of a probability of substantial effect on competition. In other words, as the Seventh Circuit concluded, "Our examination of the record in the instant proceeding fails to satisfy us that the Commission sustained its burden of showing that such a probability exists." (Petition, pp. 21-22)

We turn next to an examination of the types of evidence contained in the record. This is done not to argue the merits of the case but to demonstrate the difficulty of using this record to establish that reciprocity is or can be a market power of consequence in the food industry.

The Circumstantial Evidence Relied on by Commission Counsel

In his effort to show that reciprocity was an effective market force, Commission counsel introduced the following evidence at the trial of this case:

---

* Consolidated admitted from the outset of this case that reciprocity would, on occasion, obtain some sales. An example of this de minimis effect is J. J. Gielow & Sons, Inc., discussed in the footnote at page 10 of the petition. The Solicitor General fails to mention that the testimony quoted was adduced by Consolidated as a part of its case intended to show the true dimensions of reciprocity in the food industry. No attempt was made by Consolidated to select only witnesses from Gentry's customers who would deny reciprocity attempts or influence. The impressive fact is that practically all the 60 witnesses testified that, for a variety of reasons, reciprocity had and would continue to have no effect on their purchasing decisions.

1. Almost 200 documents involving over 65 companies showing repeated reciprocity attempts or suggestions and occasional hearsay references to reciprocity effect. (CX 6-97, J.A. 92, 113, 166, 168, 173, 175, 180, 188, 1719, 1990-2109; CX 121-218, J.A. 261, 284, 357-358, 367, 2162-2304)

2. Data showing sales of dehydrated onion and garlic by Gentry to a selected group of 22 companies, several of which were not included in the evidence described in paragraph 1. (CX 224, J.A. 668, 669)

3. Testimony by an executive of Basic Vegetable Products, Inc., Gentry's chief competitor, that, in his opinion, Basic had lost business with 21 named companies because of reciprocity. (J.A. 301-378)

4. Data showing Consolidated purchases from about 60 companies, including those named in paragraphs 1 and 3, as well as many not included in any of the documents, data and testimony so far described. (J.A. 378-668)

5. Lists showing the names and annual Gentry sales to hundreds of new accounts purchasing onion and garlic from Gentry after April, 1951. (CX 220, J.A. 378; CX 223, J.A. 668)

6. Data showing annual sales of onion and garlic to hundreds of Gentry customers who purchased dehydrated onion or garlic in 1956 or 1957 but who did not purchase either product in 1954 or 1955. (CX 221, J.A. 378)

In introducing the documents, data and testimony with respect to these groups of customers, Commission counsel presented no coherent picture of the significance of any

one group. No effort was made to coordinate the documents, testimony and data relating to any one company to develop a complete story of purchasing; no data was offered to show either the pre-acquisition sales by Gentry to the companies or the post-acquisition sales by Gentry's competitors.

No witnesses from any users of dehydrated onion and garlic were called by Commission counsel to testify to reciprocity effect.

Generally speaking, Commission counsel was content to rely on inferenees of reciprocity effectiveness drawn from (a) documents showing repeated attempts at reciprocity, (b) data showing increased Gentry sales after 1951 to Consolidated's suppliers and (c) data showing increased Consolidated purchases after 1951 from Gentry's customers.

Consolidated's Defense Was Based on Direct Evidence

To meet the circumstantial case presented by Commission counsel and to show affirmatively the factors explaining why reciprocity could not be effective in the food industry, Consolidated structured the following defense:

1. Practically all users of dehydrated onion and garlic increased their purchases after 1951 because of the increased public acceptance of dehydrated foods and products using onion and garlic (*e.g.*, dried soups, seasonings, Italian foods, etc.). During the same period Consolidated expanded in the wholesale and retail areas so that its purchases from all of its suppliers naturally increased.

2. Consolidated called witnesses from 26 of the companies named in the reciprocity documents and

data offered by Commission counsel. As to the other companies, Consolidated offered documents, data and testimony of noncustomer witnesses to completely rebut the Commission's case based on specific companies.

3. Consolidated called witnesses from 25 representative major Gentry customers. An IBM analysis was introduced to show the representative nature of the companies included in Consolidated's defense and the fact that it is the large, nationally advertising companies which account for most of Gentry's business.

4. The 60 witnesses called by Consolidated represented all types of Gentry's customers and accounted in total for 3,065,972 pounds of dehydrated onion and garlic in 1958 alone, about 37% of Gentry's sales in that year. Thus, the record covers much more than a sampling of the market in which Gentry sells.

5. Consolidated buttressed this customer evidence as to the noneffectiveness of reciprocity with testimony by executives of Gentry (J.A. 1005, 1418), and Consolidated (J.A. 1660, 1681, 1697, 1720, 1729), a Gentry salesman (J.A. 1326) and distributor (J.A. 1178) and the officials of three of its competitors (J.A. 1212, 1222, 1270, 1655). Consolidated also called an industry expert who testified to ease of entry and the existence of a number of potential entrants (J.A. 1126) and two expert economists who evaluated the market and testified to the reasons why, in their opinion as economists, reciprocity would not have any substantial adverse competitive consequences in the food industry (J.A. 1849, 1891).

Consolidated's case was aimed primarily at demonstrating why reciprocity cannot be effective in the food industry and in tracking down the effect of reciprocity attempts at each company where it was tried. The reciprocity-effect case was built on direct open court testimony—uncontradicted, corroborated by contemporaneous documents, and entirely consistent with the purchasing data.

Perhaps the best way to demonstrate the impact of this record is to take some specific examples—just as the Solicitor General chose one in his effort to show that reciprocity effectiveness was proved. (Petition, p. 10) These examples illustrate the failure of proof by Commission counsel and—at the least—the difficulties of using this record as a basis for arguing that reciprocity is a market foreclosing power.

Grocery Store Products Company

Grocery Store Products Company makes Kitchen Bouquet, Cream of Rice and other nationally advertised food products. Grocery Store Products' sales were estimated at $15,000,000 annually. Sales to Consolidated units run about $50,000 to $100,000 per year and have increased since 1950 because of growth of Consolidated and consumer demand for the products. (J.A. 409, 783-786, 794-795)

Thirty-three documents showing repeated reciprocity attempts over a period of years were placed in evidence by Commission counsel.* The documents show that Gentry salesmen requested pressure from Consolidated and that numerous reciprocity contacts were made. Thus, to give one example, a Consolidated buyer wrote Mr. Ross, President of Grocery Store Products, in 1952:

---

* CX 10-11, J.A. 175, 180, 1998-2001; CX 14-16, J.A. 188, 1719, 2006-2010; CX 35-62, J.A. 188, 2031-2062.

"I do want to point out to you that Consolidated Grocers do have a number of divisions, one of which is their Gentry division. As you may know they are producers of special seasonings, dehydrated onion and garlic and chili peppers, etc. They are very nice folks and have good products and asked if I would please bring it to your attention so they might get a hearing on the possibility of your using some of their products." (CX 42, J.A. 188, 2041)

Although some of the documents consist of "thank you" notes from Gentry to Consolidated officials for their help, the optimistic predictions in these reports were followed by Gentry complaints of a "run-around" from Grocery Store Products. (See, *e.g.*, CX 43, 46, J.A. 188, 2042, 2044.) The Gentry reports of continuous frustration are confirmed by the data which shows that except for 100 pounds of onion in 1954 and 10,022 pounds in 1955 purchased from Gentry, Grocery Store Products has always bought its requirements from Basic Vegetable Products, Inc., a Gentry competitor. Purchases from Basic increased from about 40,000 pounds in 1950 to about 60,000 pounds in 1958. (J.A. 787; RX 130, J.A. 786, 2444)

Consolidated called Mr. Ross, President of Grocery Store Products, who has controlled his company's purchasing since 1950 and was involved in the reciprocity contacts on Gentry's behalf. He testified that neither the contacts nor his company's sales to Consolidated had any effect on purchases from Gentry. He explained that the 100-pound order from Gentry in 1954 was for testing purposes—the Gentry salesman was trying to convince Grocery Store Products that it could use the much cheaper onion chips rather than sliced onion in Kitchen Bouquet. When the tests were successful, Grocery Store Products converted to onion

chips. Ross then told his purchasing agent (who had died before the hearing in this case) to give Gentry an "appreciation order" because of its help—this was the only reason for the purchase of 10,022 pounds from Gentry in 1955. (J.A. 788-791)

Ross stated directly that the 10,022-pound order in 1955 was not due to Consolidated's efforts on behalf of Gentry. (J.A. 791) He was asked about a letter written by a Gentry salesman to the Consolidated official who had discussed reciprocity with the Sales Vice President of Grocery Store Products, which stated that Consolidated was instrumental in obtaining the sale for Gentry. (CX 60, J.A. 188, 2060) Ross testified that this statement was not true. (J.A. 792)

Aside from the 1955 "appreciation order," Grocery Store Products has continued to buy all of its requirements from Basic, even though Gentry's quality has been as good or better than Basic's and even though Consolidated has been a very good customer. Ross testified that he believes in buying from one supplier until he has a good business reason for switching and has remained loyal to Basic because it supplied all his company's needs during the war when onion was scarce. (J.A. 792)

When confronted with this record, Commission counsel made this significant admission in his brief to the Seventh Circuit:

> "To be sure, Grocery Products did not [after 1955] make additional purchases of dehydrated onion from Gentry (RX 130, A 2444). This may be attributable to the fact that Grocery Products, unlike Gielow for example (pp. 39-41, *supra*), was not interested in selling its products to Consoli-

> dated under the latter's own label. *Grocery Products sold its merchandise under its nationally advertised brand names and may have felt sufficiently secure, owing to the uniqueness of its products, to resist Consolidated's pressure.*" (F.T.C. Brief, p. 58; emphasis added)

Thus was Commission counsel forced to concede a salient fact proved by this record—companies having consumer demand for their products will not respond to reciprocity. And, as the Seventh Circuit noted, most of Gentry's sales are to the larger food companies which do have consumer demand for their products. (Petition, p. 23) Pertinent here is the actual experience of four large, nationally advertising companies which have been subject to the alleged "silent reciprocity" influence ever since 1951. Oscar Mayer, Gerber Baby Foods, Armour and Birds Eye each sell from $500,000 to $1,000,000 per year of their products to Consolidated. But in 1957—six years after the merger and the last year for which complete data was available in the record—*each of these companies bought less than 1/10th of its dehydrated onion and garlic requirements from Gentry.*•

If it be suggested that the record might be otherwise as to Consolidated's private label (unadvertised) suppliers, we turn next to one of these—one where, in fact, Consolidated itself called the witness to admit that reciprocity was used, as a part of its case designed to show the de minimis effect of reciprocity (just as it called the witness from J. J. Gielow and obtained the testimony quoted in the footnote at page 10 of the petition).

• For record support, see J.A. 1552; RX 373, J.A. 1556, 2639; J.A. 1837; RX 415, J.A. 1839, 2681; J.A. 1610; RX 381, J.A. 1612, 2642; J.A. 822; RX 133, J.A. 817, 2446.

Illinois Meat Company

Illinois Meat Company packed a full line of canned meats. Its sales to Consolidated increased steadily after 1951, reaching $165,000 in 1958. (J.A. 1815-1818) Commission counsel offered one Basic document referring to reciprocity. (CX 213, J.A. 367, 2299) Consolidated called Clarence Brickman, Vice President and Manager of Illinois Meat, who testified that in 1951 a Consolidated executive, John Sarther, a family and personal friend of Brickman's, called to ask if Brickman could give Gentry some business. (J.A. 1818)

Brickman testified that after Sarther's contact, a salesman called and, since Gentry's price and quality were satisfactory, Brickman responded to Sarther's request and gave Gentry some business for a few years, as the following data on onion and garlic purchases by Illinois Meat indicates (J.A. 1818; RX 409, J.A. 1818, 2679; figures in pounds):

Year	Gentry	Basic	Puccinelli	Simplot
1950		2,520		
1951	2,500	7,000		
1952	7,500	3,750		
1953	15,160			
1954	4,870			6,250
1955	120			20,750
1956			3,000	20,500
1957	50		15,600	
1958			14,750	

Although reciprocity did obtain some business for Gentry in the years 1951-1954, it was powerless to hold or thereafter win back the business against competition based on price, quality and service. In 1954, Brickman began switching to Simplot because its price was lower and, after Simplot went out of the dehydrated onion and garlic busi-

ness in 1956, he changed to Puccinelli because he preferred its price, quality and broker. (J.A. 1819,1820)

In 1954, a Basic salesman reported that an Illinois Meat representative said he would have to buy from Gentry to keep Consolidated's good will. (CX 213, J.A. 367, 2299-2300) The evidence discussed above proves how wrong this report was—although Illinois Meat bought very little from Gentry in 1954 and subsequent years, Consolidated's purchases from Illinois Meat increased. In 1956, another Consolidated executive contacted Illinois Meat on Gentry's behalf (J.A. 156), but as the data shows, it produced no results.

This case illustrates two important aspects of reciprocity. First, it could not foreclose a market to Gentry's competitors; it was ineffective against competition based on price, service or quality. Second, Consolidated's purchases are not tied to Gentry's sales—Consolidated continued to make regular and substantial purchases even after Illinois Meat stopped buying from Gentry.

Thomas J. Lipton, Inc.

Finally, we turn to the experience of Thomas J. Lipton, Inc., a very large user of dehydrated onion and garlic for its nationally advertised dried soups and dressings. The experience of this customer alone (which buys over 6% of the total industry production of dehydrated onion and garlic*) demonstrates the inadequacy of the Commission's case.

The only evidence introduced by Commission counsel showed increases in Gentry's sales to and Consolidated's purchases from Lipton. (CX 224, J.A. 668; J.A. 386-632)

* For data, see RX 123, J.A. 674, 2438; RX 165-166, J.A. 1154, 2471-2472.

Consolidated called Louis Edwards, the Lipton purchasing executive responsible for selecting Lipton's onion and garlic suppliers at all Lipton plants since 1946, and he testified that the fact that Consolidated was a customer never affected his purchases. (J.A. 674, 678-679, 693)

Edwards began buying from Gentry in 1948 and chose Gentry as a regular second source of supply in 1950, long before Consolidated's acquisition of Gentry. While purchases from Gentry have increased since 1950, so have those from Basic; indeed, Basic has consistently obtained most of the business, having sales to Lipton of $633,000 in 1958 alone, far more than Gentry's sales. (J.A. 674-675; RX 123, J.A. 674, 2438)

Edwards explained the business reasons for his purchases from Gentry. In 1950, it became apparent to Edwards that Lipton's onion and garlic requirements were increasing to the point where it was essential to have a reliable second source of supply. Gentry was the only producer other than Basic which produced a product consistent with Lipton's quality specifications. When dried soups were introduced, Edwards' increased requirements led to increased purchases from Gentry in 1951-1953, but when the new onion soup did not sell as well as anticipated, purchases were cut in 1954. Because Basic had made heavy onion crop commitments in anticipation of large orders from Lipton, Edwards purchased practically all of his 1954 requirements from Basic out of fairness. (J.A. 674-694) Thereafter, Edwards increased his purchases from Gentry and gave the following reasons for the increase:

> "Q. • • • Aside from this two source of supply factor which you mentioned, what other factors are there, if any, that account for those increased purchases from Gentry in the years 1956 to 1959?

"A. If I recall correctly, Gentry had a new type of dehydration which appealed to me very much. It is known as Procter & Schwartz drying. Basic did not have it. They had what is known as the tunnel-type drying, a convection type drying over wood trays. * * * A wood splinter and a dehydrated onion chip look very much alike. They are very hard to detect. At our insistence, Basic installed a plastic type tray, which eliminated to a great extent the splinter problem, but the Procter and Schwartz type of drying has almost a complete absence of wood splinters and foreign material. * * * Basic had gotten partially into the plastic tray, which doesn't have the splinter tendency. Gentry was still using some of the wood trays but, as I mentioned on direct examination, they had gotten into this Procter & Schwartz stainless steel type drying which has no wood in it. No wood comes in contact with the product, so they had made further strides toward the elimination of splinters and foreign materials as compared to Basic." (J.A. 676-677, 681)

The Reasons Given by Buyers for the Noneffectiveness of Reciprocity

Many of the witnesses called by Consolidated testified in detail to the very real reasons why reciprocity cannot be an effective market force in the food industry. Purchasing agents repeatedly told of their insulation from sales department influence, their reliance on laboratory specifications and quality control department instructions as to sources of supply, their human pride in and responsibility for choosing the best ingredients at the lowest price, their

dislike for outside "pressure," their price and quality accountability to their supervisors and their flat contradiction of the claims by disgruntled salesmen from one of Gentry's competitors that sales were lost due to Gentry's reciprocity influence, rather than failure to meet Gentry's price, service and quality competition.

To take one very human example, here is the testimony by the buyer for a company (Les Pommiers Canneries) where the sales manager of Basic had claimed that Basic lost business because of Gentry's reciprocity pressure:

> "Q. Mr. Rethier, why did you buy the 3,055 pounds of onion from Gentry in 1954?
>
> "A. We are going back to my not liking to sign a contract with Basic. Meanwhile, the quality of Gentry onion was surpassing Basic. • • •
>
> "Q. What kind of barrels did Gentry have in 1954, when you got the onion from them?
>
> "A. They were very short and very wide.
>
> "Q. Would you explain why you say here, 'I don't like [Basic's] tall barrels, as the women cannot get to the bottom of them and they are an unnecessary inconvenience' • • •?
>
> "A. Yes. The barrel was very narrow and much higher than an ordinary woman. She had difficulty to pick up the merchandise, the onion, to put on the tray, in which she had to dip a measure with each can of onion. That's one of the reasons. Another reason is, those barrels you can see when you came half away that they were very broken. There were no longer flakes. That had a tendency to be the cause from transportation.

"Q. Does Basic still ship you onion in the tall barrel?

"A. Yes." (J.A. 988, 989)

This is directly corroborated by a report written in 1953 by a Basic salesman:

> "He [Rethier] refuses to accept any more of those very tall drums. Lipton also complained about the very tall drums. It seems they are more difficult to handle, fall over continually, and in the Henri Rethier plant the women cannot reach over to the bottom of the barrel to get the material, and by being small in diameter they show a large quantity of small and broken material in the bottom of each drum." (RX 57, J.A. 668, 2370)

Then, there is the testimony of the witness from Hunt Foods which is typical of the evidence showing the extent to which buyers' decisions are controlled by factors other than reciprocity:

> "A. Gentry offered Hunt Foods a price lower than Basic, and for that reason we figured that, as our quality control approved Gentry's samples of onion powder and dehydrated garlic, and also basically approved the both samples, consequently it was just a question of price. As Gentry's was lower, we thought we would give them the business; and we did. • • •
>
> "Q. [Gentry's] products were tested in your laboratory?
>
> "A. Oh, yes. Yes. See, we're not allowed to buy any condiments whatsoever unless our labora-

tory okayed and approved the products." (J.A. 1087, 1090)

It is the evidence of which the foregoing are only a few examples that makes all the more puzzling the following statement in the Commission's decision referring to the "historical instances" of reciprocity effectiveness in the transportation industry:

> "Respondent has given us no reason to believe that industry conditions preclude achieving similar results. Indeed, as we pointed out in part V, *supra,* the industry structure seems tailor-made to the exploitation of reciprocal buying power." (Petition, pp. 45-46)

But when we turn back to "part V, *supra,*" we find only a further discussion of the transportation industry cases and a description of the companies selling dehydrated onion and garlic; nowhere did the Commission face up to the fact that reciprocity must operate, if at all, in the food industry, not the dehydrated onion and garlic industry, and that this record is replete with proof of food industry conditions which prohibit reciprocity from having any substantial effect.

The Numbers Game

At every stage of this case—before the Hearing Examiner, the Commission and the Seventh Circuit—an attempt was made by Commission counsel to select a particular group of companies to prove that reciprocity was effective. When Consolidated demonstrated that it was not effective with respect to these companies, the ground was shifted at the next stage of the proceedings.

The Proceedings Before the Commission

In his argument to the Hearing Examiner, Commission counsel devoted more than half of his 255-page proposed findings to evidence showing that reciprocity was utilized with a large number of companies. In response, Consolidated adopted a company-by-company approach analyzing the absence of reciprocity effect with each of the companies relied on by Commission counsel.

In his Initial Decision, the Hearing Examiner chose nine companies on which to base his conclusion that reciprocity was an effective power in the food industry. On appeal to the Commission, Consolidated demonstrated that as to the Hearing Examiner's nine companies (as well as to all the other companies included in the reciprocity evidence) the record was overwhelming that there was no reciprocity effect of any consequence. Commission counsel in response merely repeated his argument based on many attempts at reciprocity and succeeding increases in Gentry's sales, again without paying any attention to the record of sales by Gentry's competitors to those companies.

In its decision, the Commission did not discuss the evidence with respect to any named company and it expressly did not adopt the Hearing Examiner's findings relating to the nine companies.

The Argument to the Seventh Circuit

In our brief filed with the Seventh Circuit we again reviewed the evidence with respect to each company to demonstrate the lack of any substantial reciprocity effect. In his answering brief, Commission counsel chose 17 companies (including some of those relied on by the Hearing Examiner), and discussed the evidence as to those com-

panies in an attempt to establish that reciprocity had been effective. In our reply, we took the 17 companies and demonstrated one by one the lack of any substantial effect from reciprocity, silent or overt.

This demonstrates, we believe, the impossibility of proving reciprocity effect in this record. Counsel for the Commission have repeatedly tried to avoid the inadequacies of the Commission's case but whenever attention is directed to specific companies, it becomes apparent that the record simply does not establish that reciprocity can have any substantial effect. This, we submit, is what led the Seventh Circuit to conclude that, as we have already stated, there may be a case where the record shows that reciprocity can be a significant market power having Section 7 consequences, but that this is simply not that case.

The Over-All Statistical Comparisons

Turning from the problems inherent in proving reciprocity effect by examining individual company experience to the over-all statistics, the inadequacies of the record are still apparent.

On page 39, we have compared Gentry's percentage of sales to *all* onion users (its market share) with its percentage of sales to the various groups of companies relied on at various stages of this case by the Hearing Examiner and Commission counsel to show the effectiveness of reciprocity. The year used is 1957, six years after the merger and the last year for which complete data was available for these companies.

The chart shows that Gentry did significantly *worse* in 1957 with each group of allegedly reciprocity-affected cus-

HOW VARIOUS GROUPS OF ALLEGEDLY RECIPROCITY-AFFECTED GENTRY CUSTOMERS DIVIDED THEIR ONION BUSINESS AS COMPARED TO ALL GENTRY ONION CUSTOMERS IN 1957

I.

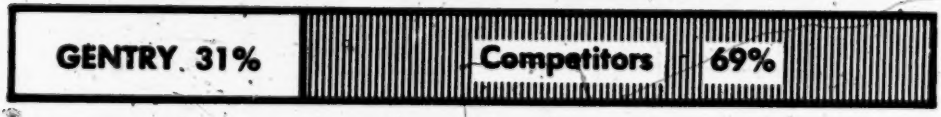
ALL ONION CUSTOMERS

II.

THREE GROUPS OF ALLEGEDLY RECIPROCITY-AFFECTED CUSTOMERS

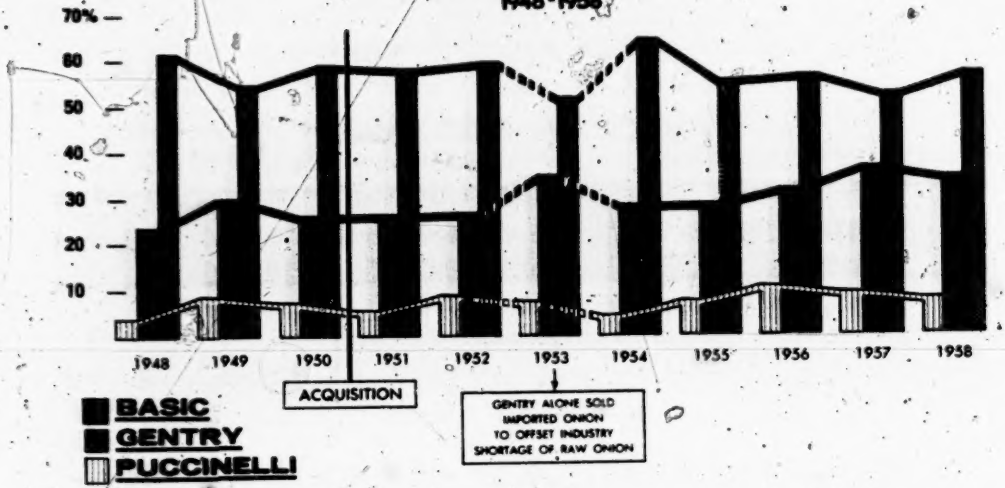
1. The 17 Companies Argued to the Seventh Circuit by Commission Counsel.

2. All 70 Companies Mentioned in the Reciprocity Evidence Introduced by Commission Counsel.

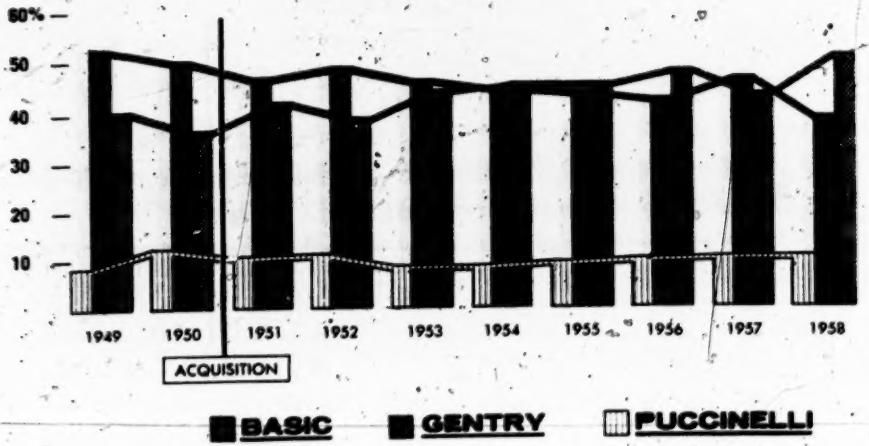


3. The 9 Companies Relied on by the Hearing Examiner.

ONION MARKET SHARES
1948-1958



GARLIC MARKET SHARES
1949-1958



tomers than it did with all onion users. This is persuasive evidence, we submit, of the difficulty of arguing that this record can be used to prove that reciprocity was or could be an effective business-getter for Gentry.

The market share data (see charts on page 40) also rebuts any conclusion of reciprocity effectiveness. (For data, see RX 170, 171, J.A. 1325, 2476, 2477.) Reference to the data will show that, despite the existence of the alleged "silent" reciprocity power since 1951, Basic has remained the dominant producer ever since the merger. Puccinelli, the smallest producer (and the one most likely to be affected by reciprocity), increased its average market share in the seven years succeeding the merger over its average for the three years prior to the merger. Overall, the market share data shows a continuation after 1951 of trends that were apparent before 1951—further indication that reciprocity did not affect the market.

Another salient fact which precludes any inference of the effectiveness of reciprocity based on onion market share data is that almost all of Gentry's increased share came after 1955* when it changed from wood to metal dehydration equipment, thereby solving the vexing wood splinter problem. (J.A. 677, 1523) Basic did not copy this improvement until several years later (J.A. 1501) and dropped from 66% of the onion market in 1954 to 52% in 1957. The Seventh Circuit found:

> "Consolidated's Gentry division in the years following the acquisition, during which time it im-

* The temporary 1953 onion increase obtained by Gentry was fully explained by Gentry's president. (J.A. 1448, 1532) Domestic dehydrators under-produced in 1952 and could not meet the 1953 market demand. Gentry alone offset this by buying imported dehydrated onion.

> proved its onion processing equipment to eliminate a problem arising from the presence of wood splinters and achieved a product of higher quality than that of its competitors, increased its share of the rapidly expanding market by only some 7% with respect to dehydrated onion." (Petition, p. 22)

That the improvement in the quality of Gentry's onion after 1955 led directly to substantially increased sales by Gentry to significant customers at Basic's expense is not just conjecture. There are a number of companies where the witnesses who did the buying testified that they gave business to Gentry instead of Basic after 1955 solely because of better Gentry quality resulting from the installation of metal dehydration equipment. Gentry's sales of onion to just three of these companies (Lipton, Snow and Beech-Nut) were over 1,000,000 pounds greater in 1957 than they were in 1954. (J.A. 677, 700-701, 880; for data see RX 123, J.A. 674, 2438; RX 124, J.A. 698, 2439; RX 138, J.A. 880, 2450) This 1,000,000-pound increase represents about 15% of Gentry's total 1957 sales and about 6% of total industry sales. Further explanation of the post-1955 increase in Gentry's onion market share lies in the fact that Simplot stopped selling dehydrated onion in 1955.

The garlic market share data is a dramatic indication of the ineffectiveness of reciprocity. From 1951 to 1957, Gentry's share of the garlic market decreased 12%. Basic seized the industry lead from Gentry and became the dominant garlic producer. Dehydrated garlic is sold with dehydrated onion to the same customers at the same time. If reciprocity were primarily responsible for the increase in Gentry's onion market share, it should have similarly affected garlic sales. But the contrast between Gentry's onion success and garlic decline is a good indication that ordinary business factors dominated purchasing decisions.

In view of the stress placed by the Commission and the Solicitor General on the power of "silent reciprocity," it requires speculation and avoidance of the record to say that the market share cross-trends are meaningless on the issue of reciprocity effect. The most logical conclusion is that the market share data corroborates all of the direct evidence that reciprocity simply has not been proved in this case to be a market power of any consequence. This is the conclusion reached by the Seventh Circuit:

> "In the face of what the Commission found to be a 'burgeoning' industry, the slight gain in over-all market position as to dehydrated onion when viewed in the light of the more significant loss of position with respect to dehydrated garlic indicates not only that reciprocity had no substantial impact but also that there is no basis for rejecting the testimony that even the overt attempts to utilize reciprocity as an influence had little effect on the firms involved." (Petition, p. 23)

CONCLUSION

While inevitably some of the foregoing discussion appears to be an argument on the merits of this case, it was not so intended. The effort has been to demonstrate that it will be impossible to show from this record that the Commission has discharged its burden of proving the effectiveness of reciprocity as a market power in the food industry. Whether this is true or not, it is surely apparent that reaching the issue raised by the Solicitor General will require a painstaking review of a mass of detailed evidence.

This record of actual food industry experience with reciprocity cannot be ignored merely by assuming that reciprocity can result in substantial market foreclosure. And

even if this fact question should be resolved against respondent, the most that the Court could decide as a matter of law is precisely what the Seventh Circuit has already held—that, if proved effective, reciprocity power can make a conglomerate merger invalid under Section 7.

Respectfully submitted,

ANDERSON A. OWEN
DANIEL WALKER
WILLIAM I. GOLDBERG

Attorneys for
Consolidated Foods Corporation

Of Counsel:

HOPKINS, SUTTER, OWEN, MULROY, WENTZ & DAVIS
One North La Salle Street
Chicago 2, Illinois

September 21, 1964